LA KAFFA INTERNATIONAL CO LTD v. LOOB HOLDING SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
RHODZARIAH BUJANG JCA
[CIVIL APPEALS NO: W-02(IM)(IPCV)-1261-07-2017 &
W-02(IM)(IPCV)-1275-07-2017]
5 JULY 2018

CIVIL PROCEDURE: *Injunction – Prohibitory injunction – Application for – Parties entered into franchise agreement – Franchise agreement terminated – Franchisee exited franchise and started similar business with franchisor – Application for prohibitory injunction by franchisor to restrain franchisee from running similar business – Whether franchisee permitted to set up rivalry business – Whether prohibitory injunction ought to be granted – Franchise Act 1998, s. 27*

CIVIL PROCEDURE: *Injunction – Mandatory injunction – Application for – Parties entered into franchise agreement – Franchise agreement terminated – Franchisee exited franchise and started similar business with franchisor – Franchisor sought to restrain franchisee from running similar business by way of prohibitory order – Application for mandatory injunction by franchisee to restrain franchisor from interfering with business – Franchisee Act 1998, s. 27*

In 2011, La Kaffa International Co Ltd ('La Kaffa'), the franchisor, and Loob Holding Sdn Bhd ('Loob'), the franchisee, had entered into a franchise agreement for the 'Chatime' business. The franchise agreement was later revised by the regional exclusive representation agreement ('the RERA'). In 2017, La Kaffa terminated the franchise agreement for purported breach of the RERA by Loob. Loob later exited the Chatime franchise and started a similar business under the name 'Tealive'. La Kaffa sought prohibitory injunctions against Loob, at the High Court, on the ground that Loob, having had the benefit of the Chatime franchise business, proceeded to set up a rivalry business which was not permissible under the franchise terms and s. 27 of Franchise Act 1998 ('the Act'). Loob, on the other hand, sought mandatory injunctions to restrain La Kaffa from interfering with its Tealive business. The order given by the Judicial Commissioner ('the JC') was not related to the restraint of trade but only for the return of La Kaffa properties and that the defendant must provide proper accounts of Tealive. Hence, the present appeals by La Kaffa and Loob against the decision of the JC.

Held (allowing La Kaffa's appeal and dismissing Loob's appeal)
Per Hamid Sultan Abu Backer JCA (for the majority):

(1) The mandatory and prohibitory injunctions were in order and the JC, upon granting the mandatory injunction, ought not to have refused the prohibitory injunction. The JC failed to consider art. 15 of the RERA and s. 27 of the Act. When parties have agreed not to do certain acts and

a statute also provides for such protection, the court is obliged to give effect to ensure the terms of the agreement and the statute are not breached. (paras 37 & 38)

(2) The JC took the view that, by granting the prohibitory injunction, the livelihood of 800 employees of Loob would affected. This was not a justifiable reason when La Kaffa's complaint was that Loob had overnight changed the name of Chatime and was running the business under Tealive. The conduct of Loob was not only in breach of legal obligation related to restraint of trade but also breach of franchise law which did not encourage criminal or tortious conduct of business and goodwill. The mandatory injunction clearly supported the breach of obligation and the fact that Loob was using La Kaffa's assets in running the Tealive business. (para 40)

Per Rhodzariah Bujang JCA (dissenting):

(1) Loob had applied to stay the prohibitory order pending its leave to appeal against the court's decision to the Federal Court. The application was dismissed by the majority. However, there was a special circumstance for allowing an interim stay. If the injunction is not stayed pending the leave application, all 179 outlets of Tealive in Malaysia would cease operations and all 1171 of Loob's employees would be out of jobs. This scenario was not just a mere fear of losing business, customers, suppliers and goodwill but a real ramification from disallowing the stay. The hardship and inconvenience will not just be suffered by Loob, as the wrongdoer, but also innocent third parties – its employees and their families which numbered more than a thousand. This included the owners of the premises where Tealive operated and with whom Loob had entered tenancy agreements with. (para 42)

(2) There would be no prejudice to La Kaffa if stay was granted because the transgression of its right by Loob would adequately be compensated by damages. In fact, the High Court had ordered Loob to affirm an affidavit every month to state the amount of gross monthly sales from Tealive and if La Kaffa wins in the arbitration proceeding still pending in Singapore, all profits from the Tealive business would go to La Kaffa. Furthermore, the full grounds of the majority judgment was ready at the time of its delivery and there would not be any delay in the hearing for motion for leave. The interim stay would very likely be for a relatively short period but the hardship and convenience caused to the innocent third parties, particularly the employees and their families, would be too great. (para 42)

Bahasa Malaysia *Headnotes*

Pada 2011, La Kaffa International Co Ltd ('La Kaffa'), pemberi francais, dan Loob Holding Sdn Bhd ('Loob'), pemegang francais, telah memeterai satu perjanjian francais untuk perniagaan 'Chatime'. Perjanjian francais ini

kemudian disemak oleh perjanjian pewakilan eksklusif daerah ('RERA'). Pada 2017, La Kaffa menamatkan francais atas dakwaan pelanggaran RERA oleh Loob. Loob kemudian meninggalkan francais Chatime dan memulakan perniagaan serupa, bawah nama 'Tealive'. La Kaffa memohon injunksi larangan terhadap Loob, di Mahkamah Tinggi, atas alasan Loob, selepas memperoleh manfaat perniagaan francais Chatime, terus menubuhkan satu perniagaan saingan yang tidak dibenarkan bawah terma-terma francais dan s. 27 Akta Francais 1998 ('Akta'). Loob, sebaliknya, memohon injunksi mandatori menghalang La Kaffa campur tangan dalam perniagaan Tealive. Perintah yang diberi oleh Pesuruhjaya Kehakiman ('PK') tidak berkait dengan halangan dagangan tetapi hanya berkait dengan pemulangan harta-harta La Kaffa dan agar defendan menyediakan akaun wajar Tealive. Maka timbul rayuan-rayuan ini oleh La Kaffa dan Loob terhadap keputusan PK.

Diputuskan (membenarkan rayuan La Kaffa dan menolak rayuan Loob)
Oleh Hamid Sultan Abu Backer HMR (keputusan majoriti)

(1) Injunksi mandatori dan larangan wajar diperintahkan dan PK, selepas membenarkan injunksi mandori, sepatutnya membenarkan injunksi larangan. Beliau gagal mempertimbangkan per. 15 RERA dan s. 27 Akta. Apabila pihak-pihak bersetuju untuk tidak melakukan tindakan-tindakan tertentu dan terdapat statut yang memperuntukkan perlindungan sedemikian, mahkamah berkewajipan menguatkuasakannya untuk memastikan terma-terma perjanjian dan statut tidak dilanggar.

(2) Pesuruhjaya Kehakiman berpendapat bahawa, dengan membenarkan injunksi larangan, mata pencarian 800 orang pekerja Loob akan terjejas. Ini bukan alasan wajar kerana aduan La Kaffa ialah Loob telah, dalam semalaman, menukar nama Chatime dan menjalankan perniagaan bawah Tealive. Tindakan Loob bukan sahaja melanggar kewajipan undang-undang berkenaan halangan dagangan tetapi juga melanggar undang-undang francais yang tidak menggalakkan penjalanan perniagaan dan nama baik berunsur jenayah atau tort. Injunksi mandatori jelas menyokong pelanggaran kewajipan dan fakta bahawa Loob menggunakan aset La Kaffa dalam menjalankan perniagaan Tealive.

Oleh Rhodzariah Bujang HMR (menentang):

(1) Loob memohon menangguhkan perintah larangan sementara menanti kebenaran merayu terhadap keputusan mahkamah ke Mahkamah Persekutuan. Permohonan ini ditolak oleh majoriti. Walau bagaimanapun, terdapat hal keadaan khas yang membolehkan penangguhan sementara. Jika injunksi ini tidak ditangguhkan sementara menanti permohonan kebenaran, kesemua 179 cawangan Tealive di Malaysia akan tamat operasi dan kesemua 1171 pekerja Loob hilang pekerjaan. Senario ini bukan sekadar ketakutan kehilangan perniagaan, pelanggan, pembekal dan nama baik tetapi satu kesan merumitkan akibat tidak membenarkan penangguhan. Kesukaran dan kesusahan bukan

sahaja akan dialami oleh Loob, sebagai pelaku salah, tetapi juga pihak ketiga yang tidak bersalah iaitu para pekerja dan keluarga mereka yang melebihi satu ribu. Ini termasuk pemilik premis Tealive yang beroperasi dan yang memeterai perjanjian sewaan dengan Loob.

(2) Tiada prejudis terhadap La Kaffa jika penangguhan dibenarkan kerana pelanggaran hak oleh Loob akan dipampas secukupnya dengan ganti rugi. Malah, Mahkamah Tinggi telah memerintahkan Loob mengikrarkan afidavit setiap bulan untuk menyatakan jumlah jualan kasar bulanan Tealive dan jika La Kaffa menang dalam prosiding timbang tara yang masih berjalan di Singapura, kesemua keuntungan perniagaan Tealive akan diambil oleh La Kaffa. Tambahan lagi, alasan penuh penghakiman majoriti sudah sedia pada masa penyampaiannya dan tidak akan ada apa-apa kelewatan dalam perbicaraan untuk usul kebenaran. Penangguhan sementara, besar kemungkinan, untuk tempoh yang singkat tetapi kesukaran dan kesusahan terhadap pihak ketiga yang tidak bersalah, khususnya para pekerja dan keluarga mereka, teramat berat.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (M) Bhd [2008] 6 CLJ 1 FC ***(refd)***

AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd [2014] 1 CLJ 821 FC ***(refd)***

Bungy Malaysia Sdn Bhd v. Menara Kuala Lumpur Sdn Bhd [2011] 3 CLJ 906 HC ***(refd)***

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd (HL) [1993] 1 All ER 664 ***(refd)***

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***

Katran Shipping Co Ltd v. Kenven Transportation Ltd [1992] 1 HKC 538 ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Plaza Rakyat Sdn Bhd v. Datuk Bandar Kuala Lumpur [2011] 1 LNS 598 HC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Raine & Horne Pty Ltd v. Adacol Pty Ltd & Ors [2006] NSWSC 36 ***(refd)***

Redland Bricks Ltd v. Morris [1970] AC 652 ***(refd)***

SA Coppee Lavalin NV v. Ken-Ren Chemicals and Fertilizers ltd (in liquidation in Kenya) (HL) [1995] 1 AC 38 ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Sidameneo (No 456) Pty Ltd v. Alexander (No 2) [2012] NSWCA 87 ***(refd)***

Sundra Rajoo v. Mohamed Abdul Majed & Anor [2011] 6 CLJ 923 HC ***(refd)***

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35 ***(refd)***
Westminster Brymbo Coal & Coke Co v. Clayton [1867] Ch 476 ***(refd)***
Wrotham Park Estate v. Parkside Homes [1974] 2 All ER 321 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 11(1)(f), (g), (h), (3)
Franchise Act 1998, s. 27
Rules of Court 2012, O. 29
Specific Relief Act 1950, ss. 53, 54, 55

(Civil Appeal No: W-02(IM)(IPCV)-1261-07-2017)
For the appellant - Khoo Guan Huat, Kwan Will Sen & Melissa Long; M/s Skrine
For the respondent - Loh Siew Cheang, Cindy Goh Joo Seong, Yap Mong Jay, Verene Tan Yeen Yi & Lim Kuan; M/s Cheang & Ariff

(Civil Appeal No: W-02(IM)(IPCV)-W-02(IM)(IPCV)-1275-07-2017)
For the appellant - Loh Siew Cheang, Cindy Goh Joo Seong, Yap Mong Jay, Verene Tan Yeen Yi & Lim Kuan; M/s Cheang & Ariff
For the respondent - Khoo Guan Huat, Kwan Will Sen & Melissa Long; M/s Skrine

*[**Editor's note:** For the High Court judgment, please see La Kaffa International Co Ltd v. Loob Holding Sdn Bhd & Another Case [2017] 1 LNS 1234 (overruled).]*

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA (majority):

[1] There are two appeals before us, related to two originating summons. Each party in the originating summons had applied for interlocutory injunctions. One party was only granted an injunction in part. The other party's application for injunction was dismissed.

[2] The case revolves around a franchise agreement which was terminated and the subject matter of the dispute is pending arbitration in Singapore.

Appeal '1261'

[3] The appellant in Appeal No. W-02(IM)(IPCV)-1261-07-2017 (La Kaffa) is the franchisor and the respondent/defendant (Loob) is the franchisee of 'Chatime' tea business. The La Kaffa had filed Originating Summons No. WA-24IP-3-02-2017 to seek an injunction to restrain Loob from operating a rivalry tea business under the name 'Tealive'. The injunction was based on breach of post-franchise term and also return of its properties.

[4] The learned Judicial Commissioner only allowed the mandatory orders (return of properties) and did not grant the prohibitory orders (restraint of trade). In consequence, La Kaffa is only appealing against part of the said judgment.

Appeal '1275'

[5] The appellant here is Loob who had filed an Origination Summons No. WA-24IP-6-03-2017 to restrain La Kaffa from interfering with their 'Tealive' business.

[6] In essence, if La Kaffa succeeds in the appeal, Loob's appeal must be dismissed.

Brief Facts

[7] The learned Judicial Commissioner heard both the applications together, delivered his decisions in one judgment and had set out the facts in great detail. We do not wish to set out facts in detail save that this judgment must be read together with the judgment of the learned Judicial Commissioner.

Franchise Agreement

[8] The first franchise agreement was entered into the year 2011. Subsequently, a revised agreement called Regional Exclusive Representation Agreement (RERA) was entered into on 15 October 2013.

[9] On 5 January 2017, La Kaffa served notice of termination for purported breach related to RERA. However, Loob by a letter dated 19 January 2017 accepted the termination based on the purported breaches of La Kaffa. In about a month later, Loob exited the 'Chatime' franchise and started a similar business under 'Tealive'.

[10] To put in simple terms, Loob having had the benefit of 'Chatime' franchise business proceeded to set up a rivalry business which La Kaffa says is not permissible under the franchise terms as well as Franchise Act 1998. In consequence, they sought injunctions to restrain Loob with other mandatory prayers. The originating summons of La Kaffa, made pursuant to s. 11 of Arbitration Act 2005 and/or inherent jurisdiction of the court sets out the problem as well as the restraining orders sought. The said orders and grounds for the order read as follows:

> 1. That the Defendant and its directors, spouses and immediate family of its directors, and employees, whether directly or indirectly itself or themselves or through agents, be forthwith prohibited from carrying on, procuring, causing, enabling, authorising and/or permitting any other business identical or similar to the "Chatime" franchised business including but not limited to:
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> (a) any business including a franchised business system in respect of any commercial venture that serves tea; and/or
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> (b) the provision of restaurant services; cafe services; cafeteria services; bar services; snack bar; hotel services; restaurant services for the provision of fast food; bubble tea shop; tea room services; canteen services; or take away food and drink services; and/or

(c) any commercial venture that serves bubble tea; carbonated iced black tea; lemon black tea; tea bag; tea powder; iced black tea; iced tea; black tea bag; tea-based beverages; tea; scented tea; scented tea bag; rose tea; chrysanthemum tea; fruit tea; mixed fruit tea bag; lemon tea; chamomile tea; kumquat tea; mint, tea; milk tea; rooibos tea; fiveleaf gynostemma tea; angelica keiskei tea; herbal tea; baicao herbal tea; herbaceous plant tea bag; mesona tea; dark plum tea; barley tea; tea with roasted rice; rice tea; coix seed and wheat germ tea; ginseng tea bag; Chinese wolfberry tea; lucid ganoderma tea; jujube tea; four substances tea; semen cassiae tea; astragalus tea; tuber fleeceflower tea; roselle tea; vegetable tea bag; burdock tea; ginger soup; ginger tea; coffee bean; cocoa powder; chocolate powder; coffee-based beverages; chocolate-based beverages; or cocoa-based beverages;

2. That the Defendant and its directors, managers, employees, officers whether directly or indirectly, by itself or through agents, be forthwith prohibited from interfering with the Plaintiff's rights and/or obligations pursuant to Article 17(IV) of the Regional Exclusive Representation Agreement dated 15.10.2013 ("RERA") to assume and perform as Master Franchisee to render operations consultancy to the Franchised Stores as defined by the RERA following termination of the RERA;

3. That the Defendant and its directors, managers, employees, officers be forthwith prohibited from directly or indirectly, by itself or through agents, disclosing and/or using and/or converting and/or enabling, procuring, causing, authorising or permitting the disclosure, use and conversion of, confidential information procured from the Plaintiff during the term of the RERA and the RERA's predecessor, the regional exclusive representation agreement dated 1.6.2011, including but not limited to the Plaintiff's franchise system's operating mode, franchised concept, technologies, formulations, ingredients, programs and designs;

4. That the Defendant and its directors, managers, employees, officers whether directly or indirectly, by itself or through agents, be forthwith prohibited howsoever from passing-off or howsoever infringing the Plaintiff's goodwill and reputation in the "Chatime" franchise system including but not limited to the reproduction and use in trade of a deceptively or confusingly similar franchise system, trade dress and/or get-up;

5. That the Defendant and its directors, managers, employees, officers whether directly or indirectly, by itself or through agents, be forthwith required to return all materials, objects and relevant confidential files containing the Logo and/or all proprietary information of the Plaintiff;

6. That costs of this application be paid by the Defendant to the Plaintiff; and

7. Such further or other orders as this Honourable Court deems fit and proper to grant.

The grounds of this application are briefly as follows:

(i) The Plaintiff is the Claimant and the Defendant is the Respondent in the Singapore International Arbitration Centre (SIAC) Arbitration No. 274 of 2016, and where the Originating Summons herein is to be served on the Defendant;

(ii) The Defendant is carrying and/or there is a real likelihood that the Defendant will carry on a competing business with the Plaintiff despite an obligation not to compete;

(iii) There is a real risk that the Defendant will use, disclose and/or convert the Plaintiff's proprietary information;

(iv) The Defendant is passing-off the Plaintiff's goodwill and reputation; and

(v) All other grounds as set out in the Affidavit in Support of CHEN ZHAO (Australian Passport Number: M7614049) affirmed in support of the application herein.

[11] Basically, the prayers sought by La Kaffa was related to restraint of trade (prohibitory orders) and return of its properties (mandatory orders). Both of these orders ought to succeed if Loob was in breach of restraint of trade provisions as well as was in possession of La Kaffa properties.

[12] The order that the learned Judicial Commissioner gave was not related to restraint of a trade but only for return of La Kaffa properties with a small window that the defendant must provide proper accounts of 'Tealive' business thereby to some extent acknowledging that Loob was in breach of restraint of trade provisions. The learned Judicial Commissioner had also relied on cases related to general principles of mandatory and prohibitory injunctions without taking into account restraint of trade obligation as well as statutory prohibition inclusive of Specific Relief Act 1950. Learned counsel for La Kaffa says that such an approach is plainly wrong and to save court's time, the brief summary of the reasons is repeated *verbatim* and it, *inter alia*, read as follows:

5. *La Kaffa*'s case for the appeal is broadly as follows.

(I) Failure to find a post-termination non-compete obligation applicable to Loob.

6. Section 27 of the Franchise Act 1998 ("Act") and Article 15 of the Regional Exclusive Representation Agreement ("RERA") contain post-termination non-compete obligations against Loob.

7. With the Act intended to regulate franchisor-franchisee conduct, and with s. 27 particularly intended to protect franchisor's interests, s. 27 clearly restricts franchisees from similar businesses during the franchise term and for 2 years after expiry or earlier termination.

8. Section 27 prevents springboarding i.e. a franchisee being intimately exposed to a particular, and likely valuable, franchise system and springboarding to its own benefit.

9. The learned JC overly formalistically looked at s. 27 in isolation and failed to appreciate the general applicability of *Noraimi Alias v. Rangkaian Hotel Seri Malaysia cases* [2009] 9 CLJ 815 and [2011] 1 LNS 1918, that contractual arrangements must be read in light of statutory obligations under this Act.

10. There is also no basis to suggest that a separate guarantee is required for s. 27 to apply. This fails to appreciate that Loob's post-termination non-compete obligation is contained in Article 15 of the RERA. Article 15 can also, and ought to, be read in light of s. 27 of the Act.

(II) Failure to appreciate and applying the special category of cases exception to the *American Cyanamid* rule.

11. With s. 27 restricting Loob from operating a similar business for only 2 years post-termination, this restraint will expire or largely pass before arbitration determined. Special cases explain that the American Cyanamid approach does not have to apply - and that *prima facie* enforceability ought to lead the interim injunction.

12. The learned JC below was wrong in summarily dismissing these cases as fetters on judicial discretion. In fact; they broaden discretion by propounding that guidelines have exceptions.

(III) Even if the standard balance of convenience test is applicable, Failure to consider Relevant Factors.

13. Alternatively, the HC Decision also wrongly applies the balance of convenience approach. Some examples:

13.1. It was wrong to assume that monetary penalties in the RERA means damages are adequate. [*Bath and North East Somerset District Council v. Mowlem Pic* [2015] 1 WLR 785].

13.2. There was no reason to doubt La Kaffa's undertaking. La Kaffa furnished evidence of its financial viability and nothing was produced in return to challenge that.

13.3. The learned JC failed to consider 'without prejudice' objections and looked at isolated events without considering relevant preceding and supervening events e.g. (i) that Loob has not and cannot deny certain breaches; (ii) that Loob had been put on notice of La Kaffa's objections since at least May 2016; and (iii) the incessant and bad faith media statements made by Loob in relation to the termination and springboarding into 'Tealive'.

14. Then, there was failure to consider that: (i) time of the restraint is not recoverable; (ii) the impact of loss of goodwill & exclusivity; and (iii) the reputational impact on Chatime propounded by Loob's media campaign post-termination.

15. Additionally, no evidence was produced to the purported impact on employees, landlords and operators. The HC Decision also misses that Loob is not prevented from operating other F&B businesses - of which it has many.

(IV) Other points highlighted.

16. A few other points are also highlighted to give context:

(a) A strong & clear case was found for the Interim Mandatory Order that Loob return all confidential information and other "Chatime" materials. Confoundingly, corresponding prohibitory orders dismissed.

(b) La Kaffa's application and appeal is not aimed to restrain Loob from trading, but to injunct replication of Chatime franchised system; and

(c) Whether La Kaffa entitled to terminate Loob is not relevant. Loob accepted termination (as opposed to affirmed the contract) and so post-termination obligations kick-in. Nonetheless, if conduct around termination is examined, the whole must be considered. This, the learned JC did not do when examining isolated events. The chronology below puts context to any of these isolated incidences and show that La Kaffa's conduct was reasonable.

[13] The order granted by the learned Judicial Commissioner reads as follows:

AND the Plaintiff by its said undertaking to abide by any order the Court or arbitrator may make as to damages in case the Court or arbitrator should hereafter be of the opinion that the Defendant shall have sustained any reason of this order which the Plaintiff ought to pay, IT IS ORDERED as follows:

1. That the Defendant and its directors, managers, employees, officers whether directly or indirectly, by itself or through agents, shall within twenty-one (21) days from the 23rd day of June 2017 return to an address in. West Malaysia designated by the Plaintiff:

(a) All materials, objects and relevant confidential files containing the Logo meaning collectively the trade marks, product names, service logos, graphic configurations, emblems, apparel, trade dress, domain names and design of "Chatime" as defined in the Regional Exclusive Representation Agreement dated 15 October 2013 ("RERA") that are in the possession, custody and/or control of the Defendant, whether in physical or digital copy or copies;

(b) All proprietary information belonging to the Plaintiff under the RERA including all information related to the Plaintiff's franchise system's operating mode and other technologies, formulations, programs, and designs that have been made known or which the Defendant has possession, custody and/or control of having been part of the Plaintiff's "Chatime" franchise, whether in physical or digital copy or copies; and sub-paragraphs (1)(a) and/or (1)(b) hereinabove shall include but not be limited to all information, materials, procedures, Standard Operating Procedures ("SOPs"), formulations, guides, manuals as set out in and related to the items listed in APPENDIX A;

and upon return of the aforementioned items to the Plaintiff, the Defendant shall delete any remaining digital copies of the same.

2. That the Defendant shall, within seven (7) days from the date of return from the above paragraph (1), make and serve on the Plaintiff's solicitors an affidavit affirming:

   (a) The Defendant's compliance with paragraph (1) above;

   (b) That all materials, objects and relevant confidential files containing the Logo per sub-paragraph (1)(a) above and/or all proprietary information of the Plaintiff as set out in subparagraph (1)(b) above no longer remain within the possession, custody and/or control of the Defendant;

   (c) That should any copy of materials, objects and relevant confidential files containing the Logo per sub-paragraph (1)(a) above and/or any copy of proprietary information of the Plaintiff as set out in sub- paragraph (1)(b) be subsequently discovered or come into the possession, custody and/or control of the Defendant, that the Defendant shall undertake not to use them and shall return them forthwith to the Plaintiff's solicitors.

3. Subject to the Plaintiff's undertaking to use the information in sub-paragraphs 1(a) and 1(b) solely to support and aid Singapore International Arbitration Centre (SIAC) Arbitration No. 274 of 2016 ("the Singapore Arbitration Proceedings"), that on the 10th day of every calendar month from the date of this Order until disposal of Singapore Arbitration Proceedings, the Defendant shall make and serve on the Plaintiff's solicitors an affidavit containing records of the Defendant's gross monthly sales from its "Tealive" business in Malaysia from the preceding month.

4. That Parties are at liberty to apply to Court to:

   (a) Discharge the above order;

   (b) Vary the above order; and/or

   (c) Enforce the above undertaking by the Plaintiff.

5. That there be no order as to costs.

Restraint Of Trade

[14] La Kaffa's case is largely premised on article 15 of the RERA and s. 27 of the Franchise Act 1998 (FA 1998). Both of these provisions relate to restraint of trade. Article 15 is in favour of the appellant in that it prohibits the respondent from post-termination, restraint of trade with no restriction in time frame. However, s. 27 gives a general protection of two years only for post-termination restraint of trade provided the respondent had given a written guarantee. It is essential to appreciate that the restraint of trade jurisprudence is related to protecting one person's interest of his business and

goodwill, etc. so that it is not plundered by another. (See *Raine & Horne Pty Ltd v. Adacol Pty Ltd & Ors* [2006] NSWSC 36; *Sidameneo (No 456) Pty Ltd v. Alexander (No 2)* [2012] NSWCA 87). When there is a case made out and the restraint of trade provision is breached, a prohibitory injunction will be in order but the court is not permitted to say damages will be an adequate remedy more so when the claimant is able to give undertaking as to damages.

[15] A simple construction of article 15 as well as s. 27 will demonstrate that there is an obligation for Loob not to compete with La Kaffa's business even after the termination of the franchise agreement. The said article 15 of RERA reads as follows:

> Article 15. Forbidden to Engage in Competition
>
> I. Forbidden during the term of the Agreement. Unless otherwise consented by the Parties in advance and in writing, during the term of this Agreement, either Party, including their managers, employees, shareholders, subsidiaries, or parent companies shall not, in the Territory, directly or indirectly, by itself or through agents, engage in any commercial activities that are identical or similar to those done in the Franchised Stores.
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> II. The Parties agree that the commercial or business activities being done in the affiliate stores of the MASTER FRANCHISEE, including their managers, employees, shareholders, subsidiaries, or parent companies at the time of the execution of this Agreement would not be deemed to be identical or similar to those done in the Franchised Stores if the said activities do not form part of the core business or are complementary to the core business of the affiliated stores.
>
> III. Application scope. The Parties hereby consent that the aforesaid sub-articles (I) and (II) shall be applied to prevent the FRANCHISOR and the MASTER FRANCHISEE from engaging in unfair competition in breach of this Agreement.
>
> IV. Default compensation. In the event any Party ("**Defaulting Party**") violates this Article, the Defaulting Party shall pay the other Party ("**Non-Defaulting Party**") a sum of USD10,000.00 as punitive penalty for each violation. All gains derive from the violation by the Defaulting Party shall also be paid to the Non-Defaulting Party as compensation and the Defaulting Party shall stop the competing activities immediately.
>
> V. Validity of the provisions of this Agreement. **This Article 15 shall survive the invalidity, expiration or termination of this Agreement** (emphasis added).

The said s. 27 of FA 1998 reads as follows:

> Prohibition against similar business
>
> 27. (1) A franchisee shall give a written guarantee to a franchisor that the franchisee, including its directors, the spouses and immediate family of the directors, and his employees shall not carry on any other business

similar to the franchised business operated by the franchisee during the franchise term and **for two years after the expiration or earlier termination of the franchise agreement** (emphasis added).

(2) The franchisee, including its directors, the spouses and immediate family of the directors, and his employees shall comply with the terms of the written guarantee given under subsection (1).

(3) A person who fails to comply with subsection (1) or (2) commits an offence.

La Kaffa's case in essence says the above two provisions give them a strong case for the granting of the prohibitory injunction.

[16] Learned counsel for Loob in opposing the appeal as well as in support of the 'Appeal 1275' *inter alia* summarises their case as follows:

5. In Originating Summons No. 24IP-6-03/2017 filed against Loob ('Loob OS') also pursuant to s. 11 of the AA, Loob sought for, among others, an interim injunction to restrain La Kaffa from interfering with the 'Tealive' business of Loob and/or the operators of 'Tealive' outlets pending the conclusion and disposal of the Singapore Arbitral Proceedings.

6. Having heard both the cases together, the learned JC allowed La Kaffa's OS in part, and dismissed Loob's OS. In particular, the learned JC disallowed La Kaffa's Prayers 1 to 4 on, essentially, the grounds that (i) the interim injunctions does not assist aid or facilitate the Singapore Arbitral Proceedings (ii) damages are an adequate remedy for La Kaffa; (iii) that the balance of convenience lies heavily against the granting of the interim restraining injunction in La Kaffa's favour; (iv) La Kaffa has been guilty of inequitable conduct within the meaning of case law and/or s. 54(j) of the Specific Relief Act 1950 ('SRA') which disentitles La Kaffa from applying for the interim prohibitory injunctions sought for in La Kaffa's Prayers 1 to 3.

La Kaffa's Appeal academic and/or will not support, assist, aid or facilitate the Singapore Arbitral Proceedings.

7. Counsel wishes to highlight that La Kaffa had, on 25.9.2017 submitted its statement of claim to the SIAC (La Kaffa's SOC'), about 3 months after the decision of the learned JC. For this, Loob has filed a Notice of Motion on 15.12.2017 seeking for, among others, an order that La Kaffa's SOC be adduced, read and taken as evidence during the hearing of this appeal.

8. In La Kaffa's SOC, La Kaffa had set out its claims and the reliefs it is now seeking in in the Singapore Arbitral Proceedings in detail. There, La Kaffa alleges various breaches of the RERA by Loob.

9. What is important to note is that, in relation to its claims, La Kaffa is now seeking for declaratory orders that Loob is in breach of the RERA together with its respective claims for (i) liquidated damages; (ii) an account of profits; and (iii) Wrotham Park damages arising out of the said breaches in the Singapore Arbitral Proceedings.

10. In La Kaffa's SOC, La Kaffa is not seeking any injunctive orders.

11. Further, there is no allegation of passing-off or inverted passing-off in the SOC at all although this was one of the basis for filing the interim injunctions.

12. Having elected to claim for purely declaratory and monetary reliefs in the Singapore Arbitral Proceedings now, the granting of the interim injunctions sought through La Kaffa's Prayers 1 to 3 will not support, assist aid or facilitate the arbitration in any way. Pursuant to the cases of *Metrod (Singapore) Pte Ltd v. GEPII Beteiligungs Gmbh & Anor* [2013] MLJU 602 and *Bumi Armada Navigation Sdn Bhd v. Mirza Sdn Bhd* [2015] 5 CLJ 652 (a decision affirmed by this Honourable Court), the court may only grant interim measures which may support, assist, aid or facilitate the arbitration under s. 11 of the AA.

13. Additionally, La Kaffa's election to claim for only declaratory and monetary reliefs in the Singapore Arbitral Proceedings only fortifies the learned JC's finding that damages are an adequate remedy for La Kaffa, should La Kaffa Prayers 1 to 3 be declined. The RERA itself had provided for numerous monetary penalties that can be claimed by La Kaffa in the event they succeed in the arbitration.

Balance of convenience lies heavily against the granting of the interim restraining injunction in La Kaffa's favour.

14. Apart from finding that damages are an adequate remedy for La Kaffa - hence, there is a low risk of injustice to La Kaffa if La Kaffa's Prayers 1 to 3 are refused, the learned JC found on the facts of the case that the interim restraining orders, if ordered against Loob, will carry a much higher risk of injustice to not only Loob, but to various third parties as well.

15. In particular, the learned JC found that should the injunctions be granted, Loob has to immediately cease the 'Tealive' business consisting of 161 outlets when there is no certainty that the Singapore Arbitral Proceedings will be concluded expeditiously and this will inevitably lead to the consequence that Loob will suffer irreparable harm. The learned JC also found that the livelihood of about 800 employees of Loob and 161 'Tealive' outlet operators will be jeopardized and that (i) the families and dependants of 'Tealive' employees; (ii) the suppliers and contractors; (iii) the bankers and creditors; and (iv) the landlords of the office and business premises of Loob and the 161 Tealive Franchisees', will all be adversely affected as well. Contracts with suppliers and landlords will have to be terminated.

16. In *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd* [2011] 1 LNS 1875 (a decision affirmed by the Court of Appeal and Federal Court), the High Court, in considering the balance of convenience in that case, found that an injunction ought not be granted if it affects rights of third parties.

La Kaffa's guilty of inequitable conduct which disentitles La Kaffa from applying for La Kaffa's Prayers 1 to 3.

17. As a court may refuse to grant the equitable remedy of an interim injunction if a plaintiff is guilty of equitable conduct (See *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566 @ 573; *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 AMR 4648 @ 4666], La Kaffa's inequitable conduct (as set out in detail by the learned JC at para 45 of his Grounds of Judgment) has been such as to disentitle itself to the assistance of the court (s. 54(j) of the SRA). As such, putting aside the issue of the correctness of the learned JC's other grounds aside, the learned JC was still entitled to exercise his discretion to refuse an interim prohibitory on equitable grounds.

Other Issues Raised by La Kaffa

18. We humbly submit that majority of the grounds in the Memorandum of Appeal ('MOA') and Supplementary MOA are touching on issues concerning serious issues to be tried. As the learned JC had held that there were serious issues to be tried, we humbly submit that majority of the grounds raised by La Kaffa in La Kaffa's MOA and Supplementary MOA need not be discussed as it would not affect the outcome of the Appeal. This is because the learned JC had dismissed the interim injunctions on the grounds mentioned above.

Conclusion

19. Though the learned JC had set out several grounds as to the reason why he had declined the interim restraining injunctions sought by La Kaffa, La Kaffa's appeal should be dismissed purely on the ground that La Kaffa is now claiming for purely declaratory and monetary reliefs in the Singapore Arbitral Proceedings. It is clear that La Kaffa's Prayers 1 to 4 will not support, assist aid or facilitate the Singapore Arbitral Proceedings in any way. Regardless of the fact that the La Kaffa's SOC was only filed after the decision of the learned JC, the truth of the matter is that La Kaffa's part appeal in relation to La Kaffa's Prayers 1 to 4 is now, in reality, academic.

20. As decided by the Federal Court in *AV Asia Sdn Bhd v. Measat Broadcast Networks Systems Sdn Bhd* [2014] 1 CLJ 821, the justice of the case must be considered in determining whether an interim injunctive relief ought to be granted. As such, particularly in a situation where the court was satisfied that the (i) the balance convenience lies heavily in Loob's favour; and (ii) La Kaffa is guilty of inequitable conduct as set out above, the learned JC should not be faulted for his exercise of his discretion in disallowing the interim injunctions sought by La Kaffa. More importantly, as the learned JC had properly directed himself upon the principles of law that were applicable to the case before him and had weighted all relevant considerations, there is nothing to suggest that the learned JC had exercised his discretion on wrong principles or has failed to take into consideration relevant matters before it-warranting appellate court intervention (*ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 3 MLJ 35 @ 39; *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858 @ 874).

21. Based on the reasons set out above, we therefore humbly submit that the Loob's appeal should be allowed with costs.

[17] It is important to note that purely based on RERA as well as s. 27 of FA 1998, La Kaffa has a cause of action in Malaysia, though the parties have agreed to arbitrate the dispute in Singapore as per article 18 of dispute settlement which reads as follows:

Article 18. Dispute settlement

I. Governing law and Agreement revision and supplement. The MASTER FRANCHISEE has duly perused this Agreement, and the Parties have fully understood all matters agreed under this Agreement, and they hereby pledge to honor this Agreement honestly and by exerting maximum goodwill. This Agreement has been entered into in accordance with the laws of Singapore, and all questions with respect to the construction of this Agreement and the rights and liabilities of the Parties shall be governed by the laws of Singapore.

II. Dispute settlement. Any dispute between the Parties arising from or in connection with this Agreement shall be first resolved through mutual consultations and amicable settlement. However, if the Parties fail to reach an agreement, the dispute shall be finally settled by way of arbitration at the Singapore International Arbitration Centre in accordance with the rules of the Singapore International Arbitration Centre for the time being in force, which rules are deemed to be incorporated by reference into this Article. The decision of the arbitrator or arbitrators, as the case may be, shall be final and the Parties to the arbitration shall strictly abide by it. The language of the arbitration shall be in English.

[18] In respect of the Singapore provision and the arbitration clause, the learned Judicial Commissioner had applied the principles relating to Private International Law to hold that on the facts, it can be presumed that the Singapore law is the same as Malaysian law. That part of the judgment read as follows:

14. Both parties had not given any affidavit evidence regarding Singaporean law which is applicable in La Kaffa's Suit and Loob's Suit (2 Suits). In such a situation, the court shall apply a rule of Private International Law which presumes that Singaporean law is the same as Malaysian law. This is clear from the following High Court cases:

(1) VC George J's (as he then was) judgments in *Eiders Keep v. Luen Mei Plastic industries Sdn Bhd* [1989] 2 CLJ 1005, at 1008, and *European Profiles Ltd v. Sentinel Steei (IV1) Sdn Bhd* [1993] 4 CLJ 577, at 582- 583;

(2) the decision of Lim Chong Fong JC (as he then was) in *Sutures (M) Sdn Bhd v. Worldwide Holdings Bhd & Ors* [2015] 8 MLJ 659, at 672-673; and

(3) *Portcullis Trustnet (Singapore) Pte Ltd v. George Pathmanathan a/l Micheal Gandhi Nathan* [2017] MLJU 223, at paragraphs 144 and 145.

15. In addition to the application of above rule of Private International Law, the 2 Suits concern the interpretation of Malaysian statutes [including s. 11(1) AA and certain provisions of FA. Hence, I have no hesitation in applying Malaysian law in the 2 Suits.

Jurisprudence Relating To Section 11 Of AA 2005 And Inherent Jurisdiction Of Court

[19] In the instant case, it is not in dispute that La Kaffa Originating Summons ('Appeal 1261') is premised on s. 11 of the AA 2005 as well as inherent jurisdiction of the court. The learned Judicial Commissioner had taken the view that inherent jurisdiction principles cannot be applied for both the actions but says the court can grant interim measures under s. 11 of the AA 2005. The learned Judicial Commissioner's reasoning on inherent jurisdiction reads as follows:

17 ... I cannot rely on the court's inherent jurisdiction to decide the 2 Suits due to the following reasons:

(1) the following decisions of our apex court have decided that there cannot be a resort to the court's inherent jurisdiction in light of a clear statutory provision in this case, namely s. 11(1) AA:

(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178, at 181; and

(b) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v. Bong Boon Chuen* [2009] 6 MLJ 307, at 320; and

(2) S. 8 AA embodies a "minimalist" approach by our courts as explained by David Wong JCA in the Court of Appeal case of *Capping Corp Ltd & Ors v. Aquawalk Sdn Bhd & Ors* [2013] 6 MLJ 579, at 588-589. Section 8 AA has been amended by the Arbitration (Amendment) Act 2011 and now reads as follows:

No court shall intervene in matters governed by [AA] except where so provided in [AA]

(emphasis added).

In view of s. 8 AA, the court can only exercise powers conferred by s. 11(1) AA without invoking its inherent jurisdiction - please see *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652, at paragraph 46. The Court of Appeal has affirmed the decision in *Bumi Armada Navigation*.

[20] In Malaysia, the Constitution is supreme (see *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 (FC); *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35). The court has very wide powers endowed by the Constitution to sustain the rule of law. In the context of sustaining the rule of law, the Malaysian courts have exercised its inherent jurisdiction to grant relief

notwithstanding the relevant statutes may not expressly or by legal construct allows the court to do so. Inherent jurisdiction will be acted upon by the courts to control its own proceedings to prevent injustice or to prevent an abuse of process of court. The jurisprudence and support for the proposition is found in a number of cases, to name a few are as follows: (a) *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319; [1984] 2 MLJ 143; (b) *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (FC). In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (M) Bhd* [2008] 6 CLJ 1, the Federal Court asserted that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction, subject to valid existing laws including the Constitution. His Lordship Tun Zaki Azmi PCA (as he then was) observed:

> [41] These are but just instances where the court has exercised its discretion to invoke r. 137. There may be many other instances where r. 137 may apply as can be seen from Civil Procedure books where High Courts exercise their inherent jurisdiction to prevent injustice or abuse of the process of the court. By the very meaning of "inherent", as discussed earlier, it is not wise to even attempt to list out the other instances where this court should exercise such discretion. It is best to leave the question open and decide the applications as they come before this court. Inherent jurisdiction is not something conferred by the statute but which it has by its very nature of being a court to enable it to do justice and prevent injustice.

[21] It will not be a correct statement of law to say that the court has lost its inherent jurisdiction to act on matters related to arbitration. The relevant section which attempts to restrict the inherent jurisdiction of the court in matters related to arbitration is s. 8 of the AA 2005 which states:

> Extent of court intervention
>
> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

[22] The matters related to s. 8 will *inter alia* include:

(i) In Part II of the Act, the following (a) stay of court proceeding where there is an arbitration agreement; (b) to grant interim measures; (c) to appoint arbitrator in certain circumstances; (d) power to deal with challenges to an arbitrator; (e) to hear appeals on the jurisdiction of arbitral tribunal; (f) to assist in the taking of evidence; (g) setting aside of arbitral awards.

(ii) In Part III of the Act as follows: (a) determination of preliminary point of law; (b) reference of questions of law; (c) tax costs in certain circumstances; (d) power to order arbitral tribunal to deliver the award; (e) power to extend time for commencing arbitration proceedings; (f) power to extend time for making the award.

[23] To grant some of the reliefs related to part II or part III will inevitably relate to cases which had considered the court's inherent jurisdiction to grant the reliefs. The jurisprudence related to injunctions and/or stay are inextricably intertwined with the principles related to inherent jurisdiction. For example, in the case of *Sundra Rajoo v. Mohamed Abdul Majed & Anor* [2011] 6 CLJ 923, an application by a member of the arbitral tribunal was successfully heard even though there was no provision in the Act to permit a co-arbitrator to make the application. Hamid Sultan Abu Backer JC (as he then was) held:

> [2] Almost all cases that the appellant relied on did not deal with a challenge taken by a co-arbitrator. The requirement of impartiality was a principle of natural justice and in consequence, the court had an inherent jurisdiction to check its breach or purported breach on the threshold when the complaint came from any interested party involved and it might include co-arbitrators or witnesses not limiting to the litigants of the arbitration proceedings *per se*.
>
> [3] The 1st respondent's argument that the applicant had no *locus standi* to seek the prayers was not supported by case laws or jurisprudence. The court was sufficiently empowered to entertain such an application and hear it on merits as breach of natural justice in appropriate cases might render an arbitral award void
>
> [4] The reading of s. 8 AA 2005 does not prohibit the intervention of court *per se* but strictly provides and governs a minimum intervention. When the Act is silent on issues outside the scope of the Act or is not governed by the Act, then the common law powers of the court could not be said to be ousted. The AA 2005 did not remove the inherent jurisdiction of the court. However, the court could not use inherent jurisdiction as a ground to intervene with matters which had been provided for in the Act. The provision was not made for the co-arbitrator to seek such relief as prayed for but it was for the litigants to do so.

[24] Section 8 is similar to article 5 of the UNCITRAL Model Law. It is now trite that s. 8 advocates a minimum intervention and not no intervention at all in matters specifically not governed by AA 2005. Support for the proposition is also found in UNCITRAL Secretariat note 25 March 1985 which say:

> 4. Another important consideration in judging the impact in article 5 is that the above necessity to list all instances of court involvement in the Model Law applies only to the 'matters governed by this Law.' The scope of article 5 is, thus, narrower than the substantive scope of application of the Model Law, i.e. 'international commercial arbitration' (article 1), in that it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the Model Law.
>
> 5. Article 5 would, therefore, not exclude court intervention in any matter not regulated in the model law.

[25] In *SA Coppee Lavalin NV v. Ken-Ren Chemicals and Fertilizers ltd (in liquidation in Kenya) (HL)* [1995] 1 AC 38; [1994] 2 All ER 449, Lord Mustil had this to say:

> Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial.

[26] In the context of AA 2005, inherent jurisdiction of court will naturally mean all the powers that are necessary to uphold, to protect and to fulfil the judicial function of administering justice within the spirit and intent of the law as stated in AA 2005 as well as rule of law as envisaged under the Federal Constitution. Under the Federal Constitution, the court is the supreme arbiter to decide what is right or wrong to sustain the rule of law in the country. Statutory provisions cannot take away the judicial role in totality. A proper reading of s. 11 will reflect that some of the orders the court may make and traditionally that involved orders related to inherent jurisdiction of court and it is now partly crystallised in O. 29 of the RC 2012. Part of s. 11 of AA 2005 has some resemblance to O. 29 of the RC 2012. The said s. 11 reads as follows:

> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for: (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; (d) appointment of a receiver; (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court; (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute; (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and (h) an interim injunction or any other interim measure. (2) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application. (3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[27] Section 11(1) *per se* allows a party to make any form of interim measure order. Whether the court will grant or not is another matter. However, the High Court is given the absolute discretion to make the specific orders stated in the section. That is to say, a party is not prohibited to make an application for any form of interim measures order. It must be noted that article 9 of UNICTRAL Model Law which is similar but not *pari materia* to our s. 11 makes provision for interim orders in the widest form. The said article reads as follows:

A Article 9

Arbitration agreement and interim measures by court.

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

B **[28]** If s. 11(1) is read disjunctively, it will clearly be in line with article 9 of the Model Law, as to the part related to interim measures.

[29] In our view, the court under AA 2005 is not ousted of its inherent jurisdiction or the powers to order interim measures order though by virtue of s. 8, the court will be slow to provide a relief if it is not clearly spelt out C in AA 2005 itself. (See *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd (HL)* [1993] 1 All ER 664; [1993] 2 WLR 262]. In *Bungy Malaysia Sdn Bhd v. Menara Kuala Lumpur Sdn Bhd* [2011] 3 CLJ 906, Mah Weng Kwai JC (as he then was) in an application under s. 11(1)(f) and/or (g) and/or (h) of the AA 2005 granted an interim negative injunction pending the disposal D of the dispute by arbitration restraining the defendants, etc. from interfering and obstructing the plaintiff's business; and notifying and/or informing the public that the plaintiff's business has been terminated. The court on the facts had this to say:

E The plaintiff's application is made under s. 11(1) of the Arbitration Act 2005. The relief sought by the plaintiff is interlocutory or interim in nature namely to preserve the *status quo* of the subject matter pending the determination by the arbitrator in the arbitration proceedings. An interlocutory injunction is limited so as to apply only until the final hearing or final determination by the court of the rights of the parties and F in this case, pending the final award by the arbitrator.

[30] In essence, the court has wide powers to grant interim relief which encompasses all types of injunctions within the jurisdiction or outside the jurisdiction. However, when it is for matters outside the jurisdiction, it must strictly relate to the parties within the jurisdiction. Section 11(3) is G supportive of any order related to interim relief even if the seat is not in Malaysia. The said section *per se* does not place caveat to say if the seat is outside Malaysia the order must only be restricted to support, assist aid or facilitate the arbitration proceedings in the seat though that must be the foremost consideration when granting an interim measure order. The learned H Judicial Commissioner on this point had *inter alia* observed:

(1) this court may only grant interim measures which may support, assist, aid or facilitates the Singapore Arbitral Proceedings.

[31] In our view, La Kaffa's application for the injunction as well as the orders are well within the jurisdiction of the court.

I

Jurisprudence Relating To Interlocutory Mandatory And Prohibitory Injunction

[32] It is trite that the threshold to grant interlocutory mandatory injunction is very high. It is usually granted when the plaintiff has an unusual strong and clear case against the defendant. The starting point to consider when injunction are sought is first O. 29 of the RC 2012 which is to be read with Specific Relief Act 1950 (SRA 1950) and case laws on this area of law. Section 53 of the SRA 1950 states:

> Mandatory injunctions
>
> 53. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

[33] The threshold to satisfy the above section may be quite straightforward between contracting parties, more so when the dispute complained of has been placed before the arbitral proceedings and the injunction is sought to sustain the integrity of the arbitral proceedings as well as the rule of law of the court's jurisdiction itself. Section 53 itself clearly requires the court to consider granting a mandatory injunction when it relates to breach of obligation unless s. 54 is made applicable to the facts of the case. The said s. 54 sets out when an injunction cannot be granted.

[34] It is trite that mandatory injunctions are orders of court which command the respondents to do some positive act or particular thing. In *Westminster Brymbo Coal & Coke Co v. Clayton* [1867] Ch 476, Megarry J observed:

> There are important differences between prohibitory and mandatory injunction. By granting prohibitory injunction the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise ...
>
> On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection.

[35] It is important to note that the court has granted mandatory injunctions in cases where the defendant knowingly steals a march over the plaintiff. (See *Wrotham Park Estate v. Parkside Homes* [1974] 2 All ER 321]. Generally, the court will not grant a mandatory injunction where it will require continuous supervision. The principles governing the grant of mandatory injunction was set out by Lord Upjohn in *Redland Bricks Ltd v. Morris* [1970] AC 652, where His Lordship observed:

A The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course'. Every case must depend essentially on its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:

B (a) A mandatory injunction can only be granted where the plaintiff shows very strong probability on the facts that grave damage will accrue to him in the future ...

(b) Damages will not be a sufficient or adequate remedy if such damage does happen. This is only the application of a general principle of equity.

C (c) Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do work to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account:

D (i) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him, or has tried to evade the jurisdiction of the court, or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and

E unreasonable acts by doing positive work to restore the *status quo* even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff.

(ii) but where the defendant has acted reasonably, although in the event wrongly, the cost of remedying by positive action his

F earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only on a much smaller scale than anticipated. Secondly, because if ultimately heavy damages does occur the plaintiff is in no way prejudiced

G for he has his action at law and all his consequential remedies in equity.

So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the plaintiff and if,

H on such balance, it seems unreasonable to inflict such expenditure on one who for this purpose is no more than a potential wrongdoer, then the court must exercise its jurisdiction accordingly. Of course, the court does not have to order such work as on the evidence before it will remedy the wrong but may think it proper to impose on the defendant the

I obligation of doing certain works which may on expert opinion merely lessen the likelihood of any further injury to the plaintiff's land.

(d) If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.

[36] Notwithstanding the English decisions on injunctions, our courts are obliged to consider the wide provisions of the SRA 1950 in particular s. 53 and should not hesitate or place its own fetters to its jurisdiction in granting mandatory injunction at the interlocutory stage to a meritorious litigant when his legal rights are infringed. It is also important to note that the threshold to satisfy a prohibitory interlocutory injunction is less stringent. (See s. 55 of SRA 1950). **When a claimant in cases related to breach of obligation succeeds in a mandatory injunction, it will follow that on the same facts the claimant generally will be able to secure a prohibitory injunction as well** (emphasis added).

[37] We have read the appeal records and the submission of the parties. We thank the counsel for their able submission. We take the view that La Kaffa's appeal in respect of the non-granting of the prohibitory injunction must be allowed. Our reasons *inter alia* are as follows:

(a) On the factual matrix of the case as well as article 15 of RERA and s. 27 of FA 1998, we are of the view that the mandatory injunction as well as the prohibitory injunction are in order and the court upon granting the mandatory injunction ought not to have refused the prohibitory injunction. The learned Judicial Commissioner's consideration for refusing the prohibitory injunction is monetary or compensation based, and read as follows:

> 39. I am of the view that damages are an adequate remedy for La Kaffa. On this ground alone, La Kaffa's 1st to 3rd Prayers should be declined. This decision is premised on the following reasons:
>
> (1) the following provisions in RERA have expressly provided for a monetary remedy in the event of any breach of RERA by Loob:
>
> (a) Article 15(IV) RERA has stated that if Loob breaches the non-compete clause in Article 15 RERA, Loob "shall" pay the following sums to La Kaffa:
>
> (i) US$10,000.00 as "punitive penalty" for each breach of Article 15 RERA; and
>
> (ii) all "gains" derived by Loob from breach of Article 15 RERA;
>
> (b) according to Article 16(11) RERA, Loob "shall" pay to La Kaffa the following sums for breach of an obligation of confidentiality in Article 16 RERA:
>
> (i) US$100,000.00 as "punitive penalty"; and

(ii) the "entire gain" derived by Loob from breach of Article 16 RERA;

(c) under Article 2(IV) RERA, Loob had guaranteed a certain sum (Guaranteed Sum) to be paid to La Kaffa based on "Gross Monthly Sales". If Loob fails to meet the Guaranteed Sum, Loob "shall" pay to La Kaffa royalty under Article 10(11) RERA which will be calculated in a stipulated manner;

(d) Loob "shall" pay to La Kaffaa franchise fee of US$1,450,000.00 by way of specified annual instalments from 30.11.2013 up to 30.6.2020;

(e) Loob "shall" pay to La Kaffa a penalty of US$10,000.00 for each breach of Article 7(1) RERA (Loob's failure to purchase raw materials from La Kaffa); and

(f) pursuant to Article 10(IV) RERA, if La Kaffa's audit discloses that Gross Monthly Sales exceed the amount reported by Loob by an amount equal to or more than 3%, Loob "shall" pay to La Kaffa 2.5% of the difference and shall bear the cost of the audit;

(2) any loss which may be suffered by La Kaffa due to -

(a) Loob's breach of non-compete contractual clause;

(b) Loob's breach of confidential information; and

(c) tort of passing off (or tort of inverse passing off) committed by Loob may be assessed and paid by Loob to La Kaffa in the form of damages; and

(3) La Kaffa (not Loob) bears the evidential onus to satisfy the court that the remedy of damages is not an adequate remedy - please see the Court of Appeal's judgment delivered by Ahmad Fairuz JCA (as he then was) in *Gerak Indera Sdn Bhd v. Farlim Properties Sdn Bhd* [1997] 3 MLJ 90, at 99. La Kaffa has failed to discharge the evidential burden to persuade the court that damages are not a sufficient relief in this case.

40. As damages are a sufficient remedy for La Kaffa, I exercise my discretion under s. 11(1)(h) AA to grant an interim mandatory injunction to compel Loob to serve on La Kaffa's solicitors an affidavit containing Loob's Gross Monthly Sales and an account of profits from Tealive Franchise business on the tenth day of every calendar month from the date of this order until disposal of Singapore Arbitral Proceedings. Such an interim measure is given pursuant to La Kaffa's prayer for "further or other orders" as this court deems fit and proper to grant - please see the judgment of Salleh Abas FJ (as he then was) in the Federal Court case of *Urn Eng Kay v. Jaafar Mohamed Said* [1982] CLJ (Rep) 190, at 198.

The above interim order is made to support, assist, aid or facilitate the Singapore Arbitral Proceedings. It is to be noted that the court may order the giving of evidence by affidavit under s. 11(1)(c) AA. The above interim measure is made subject to La Kaffa's undertaking to the court to use the information given by Loob only for the purpose of Singapore Arbitral Proceedings.

[38] The learned Judicial Commissioner in coming to the above conclusion, had failed to consider articles 15 of RERA and 27 of FA 1998 in the proper perspective related to injunction and had relied on cases where such provisions have not been dealt with. When parties have agreed not to do certain acts and a statute also provides for such protection, the court is obliged to give effect to ensure the salient terms of the agreement as well as the statute is not breached, more so when undertaking to damages is in order. The issue of compensation is remedial in nature. It is an agreed form of compensation and does not override the paramount obligation not to breach a salient term of contract which is also protected by statute. Support for the proposition is as follows: (i) *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489; (ii) *Katran Shipping Co Ltd v. Kenven Transportation Ltd* [1992] 1 HKC 538; (iii) *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd* [2014] 1 CLJ 821; (iv) *Plaza Rakyat Sdn Bhd v. Datuk Bandar Kuala Lumpur* [2011] 1 LNS 598; [2012] 7 MLJ 36. In *AV Asia*'s case, the Federal Court had the opportunity of considering a clause in an agreement and stated that a clause in a contract stipulating that injunctive relief 'may' or 'shall' be the appropriate remedy or where there is irreparable harm does not mean that such relief will be granted as of right. On the facts of the case, the Federal Court *inter alia* held:

> (3) For the reasons abovementioned, the answers to the questions of law posed herein were (a) as a matter of law, the respondent was not disentitled from asserting that damages were an adequate remedy in opposing an application for an interim injunctive relief notwithstanding cl. 15 of the MNDA and (b) the grant of an injunctive relief is an equitable remedy which is within the court's absolute discretion. The principles for the granting of such a remedy must be strictly adhered to at all times and cannot be curtailed by a contract entered into between the parties.

[39] In essence, granting or not granting an interlocutory injunction is at the absolute discretion of the trial court. The exercise of discretion of trial court will rarely be interfered by the appellate court. (See *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; [2013] 2 MLJ 650; *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35). The instant case unlike other cases in particular *AV Asia*'s case, is not related to granting or not granting the interlocutory injunction. The unique feature of this case is that the court on the complaint of the La Kaffa, the franchisor granted a mandatory order and provided some recognition in relation to prohibitory order without making the prohibitory order itself.

[40] In addition, the learned Judicial Commissioner took the view by granting the prohibitory injunction, 'Tealive' business consisting of 161 outlets and the livelihood of 800 employees of Loob will be affected. We do not see this to be justifiable reason when the complaint of La Kaffa in crude terms means that Loob has overnight change the name of business 'Chatime' and running the business under 'Tealive'. The conduct of Loob on the face

of record is not only in breach of legal obligation related to restraint of trade but also breach of franchise law which does not encourage criminal or tortious conduct of business, goodwill, etc. The mandatory injunction clearly supports the breach of obligation as well as the fact that Loob was using La Kaffa's asset in running 'Tealive' business. Failure to grant the prohibitory injunction by the learned Judicial Commissioner in our view is a flaw which needs to be corrected by appellate intervention.

[41] For reasons stated above, we take the view that La Kaffa's appeal must be allowed and Loob's appeal must be dismissed with costs. In addition to what has been allowed by the High Court, we further allow prayers 1(a), 1(b) and 1(c) which relates to prohibitory injunction. The High Court's order is varied to include these prayers.

Rhodzariah Bujang JCA (dissenting):

[42] On 27 June 2018, YA Datuk Dr Haji Hamid Sultan bin Abu Backer, and YA Datuk Dr Badariah binti Sahamid and I delivered a unanimous decision granting a prohibitory injunction against the respondent for operating its drink stall business under the name 'Tealive' which was in direct competition with that operated by the appellant under the name 'Chatime' . The respondent was the appellant's former franchise holder of the said Chatime business. The respondent had applied to stay that prohibitory order pending its leave to appeal against the court's decision to the Federal Court which was dismissed by YA Datuk Dr Haji Hamid Sultan bin Abu Backer and YA Datuk Dr Badariah binti Sahamid but which I respectfully disagreed. My reasons for doing so are these:

(i) In my considered view, there is indeed a special circumstance as envisaged by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 for allowing an interim stay and that is the undisputed fact that if the injunction is not stayed pending the leave application, all 179 outlets of Tealive in Malaysia would have to cease operation and all 1171 of the respondent's employees working with Tealive would be out of jobs. This scenario is not just a mere "fear of losing business, customers, suppliers and goodwill" as stated by this court in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 but a real ramification from disallowing the stay. The hardship and inconvenience, in other words, will not just be suffered by the respondent being the wrongdoer as found by this court and which should not be a valid consideration for granting a stay but to innocent third parties – its employees and their families which numbered more than a thousand. This includes the owners of the premises where Tealive operates and with whom the respondent had entered tenancy agreements with.

(ii) There would be no prejudice to the appellant if stay is granted because the transgression of its right by the respondent would adequately be compensated by damages. In fact the High Court had already ordered the

respondent to affirm an affidavit every month to state the amount of gross monthly sales from Tealive and if the appellant wins in the arbitration proceeding still pending in Singapore between the parties, all profits from the Tealive business would go to the appellant.

(iii) The full grounds of judgment of this court by YA Datuk Hamid Sultan bin Abu Backer was ready at the time of its delivery and therefore there would not be any delay in the hearing of the motion for leave. So the interim stay would very likely be for a relatively short period but yet the hardship and inconvenience caused to these innocent third parties, particularly the employees and their families, would simply be too great.

[43] In saying all of the above, I am fully aware that at the time of the hearing of this application, the respondent has yet to file their motion for leave to appeal in the Federal Court but I could not hold that fact against them because when the decision was delivered on 27 June 2018, the respondent was directed to file this application for stay (if it so wished) within two days from the said date and we also fixed a date for its hearing, that is 4 July 2018. An extract from the court management system of the summary of the court proceeding on 27 June 2018 is reproduced below.

Date/Proceeding Type	Minute	Result	Method of Disposal
27 Jun 2018 Keputusan	Koram: YA Datuk Dr Haji Hamid Sultan Bin Abu Backer, HMR YA Datuk Dr Badariah Binti Sahamid, HMR YA Dato Rhodzariah Binti Bujang, HMR Case is fixed for decision. Kes Berkaitan Rayuan No. W-02(IM)(IPCV)-1275-07-2017	Decision (Unanimous). Appeal 1261 is allowed under prayer 1(a), 1(b) and 1(c) of the application. The High Court's order is varied to include these prayers. Appeal 1275 is dismissed. Costs of RM30,000 here and below for both appeals subject to allocator. Deposits to be refunded. If the respondent/Loob wishes to file a motion for stay, the respondent/ Loob is given 2 days to file in the motion and the other 2 days for the appellant/La Kaffa to reply to that motion. The hearing of the motion is fixed on 4.7.2018.	Rayuan Dibenarkan

A Therefore, the respondent was merely following the directive given and the timelines set by the court in filing the application for stay of the court order.

[44] Thus, in these circumstances, I would allow the interim stay as prayed for but it is of course conditional upon the filing of the motion for leave to appeal to the Federal Court.

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